Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1999

JOHN DEW,

Petitioner,

v.

HEALTH INSURANCE PLAN OF GREATER NEW YORK and ANTHONY WATSON, Individually and as President of HIP,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Roger V. Archibald
Counsel of Record
16 Court Street, Suite 2400
Brooklyn, New York 11241
(718) 237-1111

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Should the Petition be Granted to Establish the Proper Standard to be Applied in Considering Summary Judgment Motions on Claims Under 42 U.S.C. § 1981?

2. Should the Petition be Granted to Clarify The Burden Placed on a Plaintiff to Establish a Prima Facie Case of Racial Discrimination Under 42 U.S.C. § 1981?

3. Should the Petition be Granted to Clarify the Proper Use of Statistical Evidence in Determining Whether a Plaintiff has Established a Prima Facie Case of Racial Discrimination Under 42 U.S.C. § 1981?

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The opinion of the Court of Appeals (App. *infra*, A1) is unreported. The opinion of the District Court (App. *infra*, A13) is unreported.

JURISDICTION

This is an action to recover damages for violations of 42 U.S.C. § 1981. The United States District Court for the Eastern District of New York exercised jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The United States Court of Appeals for the Second Circuit had jurisdiction to hear the appeal from the District Court's final judgment pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

PROCEDURAL BACKGROUND

The present action was commenced in the United States District Court for the Eastern District of New York. Petitioner John Dew ("Dew") sought redress under 42 U.S.C. § 1981 for the racially motivated termination of his employment as a director of the Respondent Health Insurance Plan of Greater New York ("HIP".) The complaint also asserted state law claims for negligent representation against Respondent Anthony Watson ("Watson"), the president of HIP, as well as a claim for violation of the New York State Human Rights law.

HIP and Watson sought summary judgment dismissing the complaint. (A 13.) The District Court entered summary judgment, dismissed Dew's Section 1981 claims, and declined

to retain supplemental jurisdiction over his state law claims. (A 34-37.) Dew timely appealed from the judgment.

The United States Court of Appeals for the Second Circuit affirmed the District Court's entry of summary judgment. (A1.) In an unpublished opinion, the Court of Appeals found that Dew failed to establish a prima facie case of discrimination or disparate treatment with respect to his severance pay, and concluded that the District Court did not abuse its discretion in refusing to exercise supplemental jurisdiction over Dew's state law claims. (A. 6.) This Petition followed.

FACTUAL BACKGROUND

A. Dew Became Corporate Liaison for HIP, After HIP Promised to Compensate Him for Leaving His Previous Position.

Dew, an African-American male, was initially employed by the Brooklyn Medical Group ("BMG") as a records clerk in 1978. (JA 141-142.)[1] BMG is an independent medical group that contracts with HIP, an HMO, to provide medical services to HIP members. Dew worked his way up through the ranks at BMG, becoming regional administrator in 1983. (JA 143-146.) As a result he received the correspondingly highest possible percentage merit increase. (JA 294.) A number of other director-level employees received performance ratings one or two steps lower than Dew. (JA 306-429.)

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[1]References to "JA" are to the Joint Appendix filed by the parties in the Court of Appeals.

In or around June 1995 Dew learned of plans to terminate his employment with BMG and requested a meeting with a BMG official to discuss his severance package. A few days later, Dew received a call from Watson, who was President of HIP. (JA 154-155.) Dew and Watson met in person, and Dew claims that Watson told him HIP would take care of seeing that Dew received a generous severance package for leaving BMG, although Watson denies this. (JA 157, 205-15, 218.) Within two weeks Dew began working at HIP as corporate liaison, a director level position. (A 3.)

B. Dew Received Assurances About His New Position and HIP's Commitment to Compensate Him for His Severance From BMG.

Shortly after beginning work at HIP, Dew began discussions with HIP regarding the terms of his employment and the severance he would receive for leaving BMG. (JA 216-217.) Dew felt the agreement proposed by HIP was unacceptable, particularly with respect to the provisions relating to his severance from BMG, but he signed it under pressure from HIP. (JA 164-170.) Dew signed the agreement, but never received additional compensation for his severance from BMG beyond the one week per year specified in the agreement, despite assurances from Watson that HIP would take care of it. (JA 173-174.)

As HIP corporate liaison, Dew recovered millions of dollars in money HIP was entitled to collect from Medicare, but had not been aware of, and recovered substantial additional money from co-payments HIP had been previously unable to collect. (JA 174a-174c.) While employed at HIP, Dew received the highest possible performance rating on his

performance evaluations: significantly exceeds expectations (5 %.) (JA 430-441.)
Only half of the directors received the highest rating, and there were directors receiving the rating two steps lower (fully meets expectations - 3 %) who were not laid off. (JA 245-247, JA 306-429.)

C. Falcove, a Person Known to Make Racially Insensitive Remarks, Becomes Dew's Direct Supervisor Less Than Two Months Before He is Fired.

Less than two months before he was laid off from HIP, Dew was told that he would be reporting to Dr. Michael Falcove ("Falcove"). (JA 175-176.) Falcove was known to make racially insensitive remarks, and Dew testified to one specific remark that an Indian doctor had his "towel... wrapped too tight." (A 9.) Dew also testified that Falcove routinely made racially insensitive remarks directed at all minorities. (A 9; JA 175.) On February 6, 1997, Dew and twenty-eight other employees were laid off in what was described as a Reduction in Force ("RIF".) (A 3-4.) Dew was the only African American at the director level to be laid off.(A 9.)

D. Dew Receives Severance Pay Disproportionately Low in Comparison to non-African American Directors With Less Seniority.

As severance compensation from HIP, Dew received a check for 3.2 weeks pay (one week per 6 months service at HIP.) (A 4.) Dew objected vociferously that he had not received fair severance compensation from HIP and, that HIP

owed him supplemental compensation relating to his severance from BMG. (JA 190-192, JA 194.) He also attempted to contact Watson to discuss the issue of the inadequate severance from BMG, but was not permitted to speak to Watson. (JA 193.)

Despite the fact that several caucasian management employees of HIP have received compensation well beyond that provided by the severance formula contained in the employee manual, Dew did not. While the Court of Appeals states that Dew could not identify any similarly situated employees who received severance pay other than as provided by the formula, Dew did identify three such individuals. (JA 195, JA 284, JA 290-291.)

E. While Allegedly Terminating Dew to Cut Costs, HIP Gave Raises to Several of its Vice-Presidents.

Following the purported RIF that included Dew, several vice presidents received a pay raise and promotion into newly created corporate senior vice president positions. (JA 226, JA 236-237.) Moreover, before the year was over, the number of directors in Dew's medical department returned to pre-layoff levels -- hardly a "reduction in force." (JA 443-446.) The only difference was that instead of two African-American directors, there was now only one. (JA 445.)

HIP's only alleged guideline for determining which positions to eliminate was whether the position was duplicative, could be parceled out, or could be consolidated. (JA 220.) None of the witnesses from HIP could say who selected Dew's position for elimination or what rationale HIP used to determine if the person met the criteria for termination. (JA 222, JA 242.)

F. The RIF Has a Disparate Impact on Non-Caucasian Directors.

When Watson became President in 1985, more than 90 % of the vice presidents were caucasian, and the directors were primarily caucasian. (JA 199-201.) Immediately prior to the RIF in February 1997, Dew was one of only two African American directors in the medical department (out of a total of 20, 18 of whom were caucausian), and one of as few as four African-American directors among the fifty or so total directors throughout HIP. (JA 443-446, 240-241.) However, Dew was the only director throughout HIP selected for layoff. (JA 235, JA 30 ¶ 24.) By the end of 1997, the number of directors in the medical department was back to the pre-layoff figure of 20, though there was still only 1 African-American director. (JA 443-446.)

The Court of Appeals pointed to the fact that HIP had five African-American member on its Board of Directors as evidence of HIP's lack of discriminatory intent. (A 9.) In identifying these facts, however, the Court of Appeals did not discuss other facts relating to the racial composition of HIP's workforce. For example, both the president of HIP New York (Dan McGowan) and the executive vice president (John Steber) were caucasian. (JA 277.) None of the 12 vice presidents was African American. (JA 278-279.) Of ten managing directors, all were caucasian, except for two African Americans. (JA 279-280.) The majority of the assistant directors were caucasian. (JA 281-282.)

REASONS FOR GRANTING THE PETITION

This Court should exercise its supervisory power to establish what standard should be applied in considering summary judgment motions under 42 U.S.C. § 1981. Specifically, the Court should consider whether the Court of Appeals strayed from the multi-stage *McDonnell-Douglas* test articulated by this Court for discrimination cases by collapsing that multi-stage analysis into a single assessment of whether Dew presented enough evidence to succeed on his claim of race discrimination based on an implied contract of employment. The Petition should also be granted to consider whether the Court of Appeals ignored this Court's precedents by focusing only on statistical evidence that support its conclusion that HIP acted without a discriminatory motive, when there was undisputed evidence in the record, both anecdotal and statistical, that at least raised an issue of fact with respect to HIP's motivation. Based on this record, summary judgment should not have been granted, and this Court should intervene to correct the Court of Appeals' erroneous application of summary judgment procedures in contravention of the spirit and letter of the Federal Rules.

POINT I – The Petition Should be Granted to Establish the Proper Standard to be Applied in Considering Summary Judgment Motions on Claims Under 42 U.S.C. § 1981.

The Court of Appeals has effectively articulated a new standard for considering a plaintiff's claim of race discrimination in cases under 42 U.S.C. § 1981. By ignoring the multi-stage test articulated by this Court in *McDonnell-Douglas* and simply assessing whether Dew's evidence on the whole was sufficient to survive summary judgment, the Court of Appeals has departed from settled procedures. Summary judgment should only be granted in the absence of genuine issues of material fact, and in discrimination cases, including those under 42 U.S.C. § 1981, that analysis is tied to the *McDonnell-Douglas* framework. The Court of Appeals deviated from that framework in this case, thereby improperly depriving Dew of his day in Court, and the Petition should be granted to establish that such deviations are not permissible.

A. Summary Judgment Should Not be Granted Where Genuine Issues of Material Fact Exist.

Summary judgment is not be "used to deprive a litigant of a full trial of genuine fact issues." 10A Wright & Miller, *Federal Practice and Procedure 2d* § 2712 (1998). In an early decision interpreting the summary judgment rule, the Fifth Circuit opined that

> summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the

> truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is o carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.

Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940). This Court, in its more recent decisions interpreting the rule, has explained that summary judgment is not a substitute for trial. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or a motion for directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party responding to a motion for summary judgment must be given a meaningful opportunity to respond and combat the motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (Rule 56 must be construed with due regard for party bringing motion and for the rights of persons asserting defenses "adequately based in fact to have those claims and defenses tried to a jury").

B. This Case Also Presents the Issue of Whether Dew's Could Make a Contract Claim Under 42 U.S.C. § 1981 if He Was Considered an At-Will Employee Under New York Law.

The Court of Appeals' decision affirming entry of summary judgment is particularly significant because it appears to set a standard for cases under 42 U.S.C. § 1981 involving breaches of implied employment contracts. Here, HIP argued

that because Dew was an at-will employee under New York law, he did not have a contract with HIP and therefore could not state a claim under section 1981. (A 19.)

The circuits are split on the issue of whether section 1981 protections are applicable to persons considered at-will employees under state law. A number of courts have dismissed claims under section 1981on this ground. *See, e.g. Gonzalez v. Ingersol Mill Mach.* Co., 133 F.3d 1025, 1035 (5th Cir. 1998), while other courts have decided differently. *See. e.g., Spriggs v. Diamond Auto Glass*, 165 F.3d 1015 (4th Cir. 1999); *Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc.*, 160 F.3d 1048 (5th Cir. 1998). The Second Circuit has not specifically ruled on this issue, and in this case, the Court of Appeals declined to reach the issue, concluding that, even if Dew were protected by section 1981, he failed to allege facts sufficient to withstand a summary judgment motion. (A 7.) If the Court of Appeals was incorrect in affirming summary judgment based on Dew's alleged failure to meet his burden of establishing racial discrimination, the Court could then consider the significant issue of whether section 1981 covers persons considered to be at-will employees under state law.

C. The Court of Appeals Improperly Confounded the Applicable Three-Step Analysis in Determining There was No Discrimination as a Matter of Law.

The Court of Appeals asserted that it was applying the well-settled three-step analysis applicable to discrimination cases to this section 1981 claim. (A 7.) Under this precedent, (1) the employee must establish prima facie case of discrimination, (2) if the employee is successful, the burden shifts to the employer,

which must articulate a legitimate, nondiscriminatory reason for the discharge, and (3) the burden then shifts back to the employee, who then has the opportunity to demonstrate that the proffered reason was merely a pretext for discrimination. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1224-25 (2d Cir. 1994). The Court of Appeals stated that it did not have to decide whether the District Court was correct in finding that Dew failed to make out a prima facie case. (A 10.) Instead, the Court of Appeals simply stated that an "isolated racial remark . . .is not enough to survive summary judgment," and the statistical evidence is "inconclusive, at best," never specifying whether this was a failure to articulate a prima facie case or to rebut HIP's claim that its termination of Dew was based on a legitimate, nondiscriminatory reason. (A 7.)

By failing to articulate whether Dew, HIP, or both met or failed to meet their respective burdens at each separate stage of the *McDonnell-Douglas* analysis, the Court of Appeals effectively re-wrote this Court's jurisprudence. *McDonnell-Douglas* is not a basis for simply stating a general proposition that the evidence "is not enough to survive summary judgment." The three-step analysis assigns burdens to each party at specific stages. *McDonnell-Douglas*, 411 U.S. at 802-04. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Court discussed at length the shifting burdens under *McDonnell-Douglas* and the significance attached to each separate stage of the analysis. *Hicks*, 509 U.S. at 509-12. Whether Dew established some evidence of racial animus is a separate question from whether the purported RIF was a pretext for discrimination. Had that analysis been properly carried out under proper summary-judgment procedures, summary judgment could not have been entered. The Petition should be granted to allow the Court to reaffirm or re-examine the validity

of the *McDonnell-Douglas* analysis.

D. The Lower Courts' Improper Application of the Summary Judgment Standard Deprived Dew of His Day in Court.

The errors of the District Court and the Court of Appeals deprived Dew of any legitimate opportunity to protect his interests, and Dew was thereby denied the procedural safeguards afforded by the Federal Rules and this Court's precedents. While the procedure of summary judgment itself, when properly followed, does not implicate due process or violate any Seventh Amendment right to trial by jury, *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902) (where there are no properly controverted factual issues, no jury trial is required), because the District Court misapplied the rules, the Court of Appeals sanctioned the misapplication, and it is clear that issues of material fact did exist, Dew did not receive a full and fair opportunity to defend himself in violation of his due process rights. *See Detenber v. American Universal Insurance Co.*, 389 U.S. 987 (1967) (Black, J., dissenting) (dissenting from denial of certiorari because improper entry of summary judgment violated Seventh Amendment right to trial by jury); *cf. Logan v. Zimmerman Brush Co.* 455 U.S. 422 (1982) (party has property interest to be protected by due process in right to use procedures set up by government to adjudicated disputes).

This Court's intervention in its supervisory role is crucial. As commentators have noted, "summary judgment must be used with a due regard for its purposes and should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues." 10A Wright &

Miller, *Federal Practice and Procedure 2d* § 2712 (1998). This Court's carefully crafted summary judgment jurisprudence, as set out in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and its relationship to the *McDonnell-Douglas* analysis, is adversely affected impacted by the decision of the Court of Appeals. To protect the integrity of summary judgment jurisprudence and allow Dew his rightful day in court, the Petition should be granted.

POINT II **The Petition Should be Granted to Clarify What Evidence is Sufficient to Meet a Plaintiff's Burden to Establish a Prima Facie Case of Racial Discrimination Under 42 U.S.C. § 1981.**

The Court should consider whether the Court of Appeals properly ignored evidence that Dew's supervisor harbored racial animus because it found that evidence to be ambiguous. In previous decisions, this Court has specifically noted that a plaintiff has only a minimal burden to establish that race was a factor in the decision to discharge an employee. Here, Dew presented evidence that his supervisor, who the Court of Appeals acknowledged was involved in the decision-making process, exhibited racial bias in the workplace. Because discriminatory motivations are often concealed, this Court should grant the Petition to reaffirm that summary judgment should rarely be granted in discrimination cases based on lack of direct evidence of motive. In particular, where evidence of Dew's value to HIP and his outstanding performance belied HIP's assertion of legitimate, non-discriminatory reasons for its decision to terminate him, the Petition should be granted to clarify that summary judgment

should not be cavalierly entered where a reasonable jury could disagree with the Court of Appeals' interpretation of the facts.

A. Dew Had Only a Minimal Burden to Establish That Race Was a Factor in His Discharge.

Dew's evidence of his supervisor's racial bias was sufficient to establish a prima facie case and survive summary judgment. In cases involving RIFs, a plaintiff must establish four elements to make out a prima facie case of discrimination – (1) that the plaintiff belongs to a protected group, (2) that he was qualified to assume another position if it had been available at the time, (3) that he was discharged, and (4) that the discharge occurred under circumstances suggesting race was a factor. *Gallo v. Prudential*, 22 F.3d at 1224. The fourth element – whether race was a factor in the discharge – is the only element at issue in this case. The burden on a plaintiff to establish a prima facie case is minimal. *Hicks*, 509 U.S. at 506. To establish the fourth factor, circumstances suggesting race was a factor, a plaintiff need only establish that there is some evidence from which a rational finder of fact could infer a discriminatory motive. *Gallo*, 22 F.3d at 1224. Here there is evidence from which a rational jury could infer discriminatory intent.

B. Evidence of Falcove's Racial Bias Suggests That Race Was a Factor.

The Court of Appeals entirely discounted evidence that Dew's supervisor, Falcove, was known to make racially insensitive remarks. (A 8-9.) In reaching its conclusion that this evidence was insufficient to survive summary judgment, the Court of Appeals focused on Dew's testimony that he never

personally heard Falcove make insensitive remarks about African Americans and could identify only one remark by Falcove relating to race. (A 8-9.) This remark, a derogatory reference to persons of Indian descent made in Dew's presence, was by itself some evidence of Falcove's racial insensitivities. Whether that remark alone is sufficient to survive summary judgment should not have been the issue, had the Court of Appeals followed accepted summary judgment practice.

To reach its conclusion, the Court of Appeals simply ignored the other evidence in the record suggesting that Falcove's actions were motivated by racial bias. Dew did testify, however, that Falcove made remarks "pretty routinely", which were "insensitive" to African Americans and other minorities, even though he could not recall the specific wording of such remarks. (JA 175). In focusing on Dew's inability to remember specific remarks, the Court of Appeals misapplied summary judgment practice. If the remarks themselves were ambiguous and could not be identified specifically, the remarks merely raised a fact issue precluding entry of summary judgment. *See Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 53-54 (2d Cir. 1998).

C. Because Discriminatory Motives are Often Hidden, Summary Judgment Should Rarely be Granted in a Discrimination Cases on the Issue of Whether Race was a Factor in the Personnel Decision.

The Court of Appeals decision to discount evidence it found to be insufficiently specific is particularly troubling in this case of racial discrimination. In a discrimination case where employer intent is at issue, the court must be particularly

cautious about granting summary judgment because direct evidence of discriminatory intent is extremely rare, as the Court of Appeals has itself pointed out on other occasions. *Gallo*, 22 F.3d at 1223-24; *Luciano v. Olsten Corp.*, 110 F.3d 210, 215 (2d Cir. 1997). This Court should grant the Petition to reaffirm the principle that, particularly in cases involving discrimination, due to the difficulty of proving motive, summary judgment should rarely be granted on the issue of racial motivation. A plaintiff should not be denied a day in court and an opportunity to convince a jury that discriminatory intent was a factor simply because the court is dissatisfied with the specificity of plaintiff's evidence.

D. Evidence Questioning HIP's Proffered Reasons for Terminating Dew Created a Triable Issue of Fact.

The Court of Appeals ignored this Court's precedents in effectively refusing to consider other evidence in the record that belied HIP's efforts to assert that its reasons for terminating Dew were based on legitimate, non-discriminatory reasons. The criteria established for the selection of positions to be eliminated were exceedingly vague, with the decision left to department heads or their designees, giving rise to suspicions that positions were arbitrarily selected according to the whims and prejudices of department heads and their close associates. The only criteria Watson was aware of for selection of non-management employees were "duplicative jobs, jobs we can parcel out to others, jobs that we can consolidate, the usual things like that." (JA 220). Notably, he was not aware of any criteria for selection of management-level positions to eliminate. (JA 221). No person at HIP could exclude the possibility that Falcove, who exhibited racial bias, played a role in the decision to include Dew in the layoff. None of the witnesses from HIP could say

who selected Dew's position for elimination. (JA 222, JA 242). This tremendous vagueness and lack of oversight created a significant possibility of discrimination in the selection of positions for elimination, particularly where there does not seem to be any other rationale for why Dew was selected for termination.

The Court of Appeals simply ignored this evidence, simply accepting, without challenge, HIP's assertion that Dew's job was recently created and nonessential. (A 10.) In effect, the Court of Appeals did not even consider the evidence proffered by Dew that this alleged reason was actually a pretext. In fact, a rational jury could infer from this evidence, combined with the other evidence of discriminatory intent, that selection of Dew's position was based upon a discriminatory motive. A jury could conclude that if HIP was unable to articulate a specific reason for Dew's termination, and could not even identify with any precision the reason why Dew was selected for termination as opposed to any other director, that HIP had something to hide. In particular, a jury could question why Dew, with stellar performance reviews and having recovered millions of dollars for the company, would be selected. (JA 72, 430-440.) Indeed, a jury could conclude that the selection of Dew for termination makes no sense unless a discriminatory motive is inferred. This conclusion could also be re-enforced by evidence that, while HIP claimed its RIF was necessitated by economic considerations, it contemporaneously gave raises to several executives. ((JA 226, 236-37.) By discounting this evidence, along with the evidence of Falcove's bias, the Court of Appeals improperly denied Dew his opportunity to present his case to a jury, and the Petition should be granted to consider the Court of Appeals' revamped analysis of summary judgment in discrimination cases.

POINT III - The Petition Should be Granted to Clarify the Proper Use of Statistical Evidence in Determining Whether a Plaintiff has Established a Prima Facie Case of Racial Discrimination Under 42 U.S.C. § 1981.

The Petition should also be granted to consider the Court of Appeals' use of statistical evidence as a basis for discounting all of Dew's evidence that race was a factor in the decision to terminate him. The District Court and the Court of Appeals were led astray by statistics showing the racial makeup of HIP's entire workforce and by the fact that HIP's president was an African American and that HIP had African Americans on its Board of Directors. Based on these facts, the Court of Appeals refused to consider other statistical evidence showing discriminatory intent, in contravention of clear precedent and to the marked detriment of Dew.

The Court of Appeals focused on the overall percentage of African Americans employed by HIP and thereby ignored the persuasive effect of Dew's statistical evidence. In its discussion of Dew's statistical evidence, the Court of Appeals acknowledged that, by terminating Dew, HIP was left with only one African American director in the medical department, out of twenty director positions, and that HIP's middle and upper management were predominately caucasian. (A 9.) In rejecting this evidence as proof that race may have been a factor in the composition of the RIF, the Court of Appeals, without explaining how this affected a decision to terminate an upper-level management employee, looked at HIP's overall workforce, including all low-level positions and noted that African Americans made up 40% of the total work force. (A 9.) In addition, the Court of Appeals, echoing the District Court, stated that it was "notable" that "five members of the Board of

Directors, as well as the Chairman and CEO, were African American," as if this established there was no race discrimination involved in Dew's termination. (A 9.)

This Court has previously stated that, for statistical evidence to be of use in discrimination cases, a proper comparison must be made. For example, in *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977), the Court rejected efforts to compare the percentage of teachers in a school district to the overall student population, nothing that a proper comparison would be between the racial composition of the teaching staff and the "racial composition of the qualified public school teacher population in the relevant labor market." *Hazelwood*, 433 U.S. at 308. Here, the Court of Appeals did not make such a legitimate comparison, but instead compared two statistics that are not relevant to each other – overall employment and the racial composition of management-level employees.

Clearly at the management level, the lack of minorities in upper management positions suggests discrimination. Specifically, the Court of Appeals ignored evidence that

- By the time of Dew's termination, there were still perhaps only 4 African-American directors of roughly 50 total directors throughout HIP, and only 2 African-American directors of 20 in the medical department. (JA 234, JA 240-241, JA 446).

- While an African American may have served as CEO, both the president and executive vice president of the company were caucasian. (JA

277).

- None of the 12 vice presidents was African American. (JA 278-279).

- Of ten managing directors, all were caucasian except for two African Americans. (JA 279-280).

- The majority of the assistant directors were caucasian. (JA 281-282).

- Terminating Dew skewed the racial balance of the directors even more because, while the number of directors in the medical department quickly returned to the pre-layoff figure of 20, there was now only 1 African-American director instead of two. (JA 445).

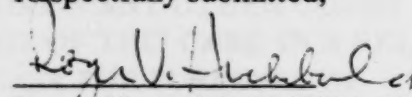
The Court of Appeals did not even address these statistics in its opinion, even though such statistics do at least suggest discrimination. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) ("statistics can be an important source of proof in employment discrimination cases").

The Petition should be granted to reaffirm the proper use of statistical evidence in determining whether discrimination has occurred in employment cases.

CONCLUSION

The questions presented in this Petition are important questions of law involving this Court's supervisory power over the lower courts and the federal rules. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Roger V. Archibald (RVA 0588)
Roger V. Archibald, P.C.
16 Court Street, Suite 2400
Brooklyn, New York 11241
(718) 237-1111

Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of March, two thousand.

PRESENT:

HON. JAMES L. OAKES,
HON. GUIDO CALABRESI,
HON. FRED I. PARKER,
Circuit Judges

JOHN DEW,

Plaintiff-Appellant,

SUMMARY ORDER

v. No. 99-7953

HEALTH INSURANCE PLAN OF GREATER NEW YORK and ANTHONY WATSON, Individually and as President of HIP,

Defendants-Appellees.

Appearing for Appellant:	ROGER V. ARCHIBALD, Brooklyn, N.Y.
Appearing for Appellees	CHARLES G. MOERDLER, Stroock & Stroock & Lavan LLP, New York, N.Y. (Alan M. Klinger, Howard S. Lavin, David A. Hillman, on the brief).

Appeal from the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and it hereby is AFFIRMED.

Plaintiff-appellant John Dew appeals from a final judgment of the United States District Court of the Eastern District of New York (I. Leo Glasser, *J.*), granting summary judgment to defendants-appellees Health Insurance Plan of Greater New York and Anthony Watson (collectively, "HIP") on Dew's claims of discriminatory discharge and disparate treatment based on race in violation of 42 U.S.C. § 1981, and declining to exercise supplemental jurisdiction over Dew's claim under New York State Law.

BACKGROUND

The following facts are undisputed. Dew, who is African-American, was employed by HIP as Corporate Liaison in HIP's Medical Department from late 1995 until February 1997. HIP is a non-profit medical corporation and insurer that contracts with independent medical groups to provide primary medical care to its insureds. Before being hired by HIP, Dew had worked at Brooklyn Medical Group ("BMG"), one of the independent medical groups that provided medical services to HIP's subscribers. After Dew was terminated by BMG, HIP created the Corporate Liaison position for him; in that capacity, Dew acted as the intermediary between HIP and medical groups with which it contracted. Dew was an at-will employee with no written employment contract.

In early 1997, HIP decided to cut costs by implementing a mass lay-off, or reduction in force ("RIF"), of management employees. Each department was asked to indentify nonessential positions. The Medical Department chose Dew's Corporate Liaison position for elimination. On February 6, 1997, Dew and twenty-

eight other management employees were laid off. Seven of the twenty-nine employees laid off (24%) were African-American; of the employees let got who were at the Director level or higher, however, only Dew was African-American. In the company as a whole, approximately 40% of the employees were African-American, including five Directors and the Chairman and CEO, Anthony Watson.

In accordance with a policy described in its personnel manual for terminations pursuant to a RIF, HIP allotted Dew severance pay equal to one week's pay for every six months he had been employed by HIP. None of the employees laid off in the 1997 RIF was ever recalled or rehired.

Dew brought this action under 42 U.S.C. § 1981, claiming (1) that he was terminated because of his race and (2) that he received disparate treatment because of his race in that he was given less severance pay than other similarly situated management employees. He also asserted (3) a claim for negligent misrepresentation under New York Law, contending that HIP had

promised him money to make up for the severance pay that he had sought, but did not receive, from BMG, and (4) a claim that HIP had violated the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107.

The district court granted summary judgment on HIP on Dew's claims of discriminatory discharge and disparate treatment in violation of § 1981. It held that (1) Dew's status as an at-will employee did not preclude him from bringing a claim under § 1981; (2) Dew had failed to make out a prima facie case of racial discrimination in his termination or to point to disputed issues of material fact sufficient to allow a reasonable jury to find that HIP's asserted reason for his termination was pretextual; (3) Dew had failed to make out a prima facie case of disparate treatment with respect to his severance pay, because he was unable to identify any similarly situated employees who were treated differently. The district court declined to exercise jurisdiction over Dew's pendent state law claims.

This appeal followed.

DISCUSSION

On appeal, Dew contends (1) that the district court erred in finding that he failed to make out a prima facie case of discriminatory discharge or to identify disputed issues of material fact as to whether HIP's reason for his termination was pretextual; (2) that the district court erred in finding that he had failed to make out a prima facie case of disparate treatment with respect to his severance pay; and (3) that the district court erred in refusing to retain jurisdiction over his supplemental state law claims. Finding Dew's contentions meritless, we affirm.

We review a district court's grant of summary judgment *de novo*. *See Quinn v. Green Tree Credit Corp.*, 159 F. 3d 759, 764 (2d Cir. 1998). We construe all evidence in the light most favorable to the nonmovant and draw all reasonable inferences in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is proper only when "there is no genuine issue of material fact to be tried and . . . the facts as to which there is no such issue warrant judgment for the moving party

as a matter of law." *Cronin v. Aetna Life Inc. Co.*, 46 F. 3d 196, 202 (2d Cir. 1995). An issue is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

Section 1981 provides, *inter alia*, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). HIP argues that, as an at-will employee, Dew did not have a "contract" with HIP such that he can invoke § 1981. We need not decide this issue, however, because assuming arguendo that Dew is protected by § 1981, he has failed to allege facts sufficient to withstand a motion for summary judgment.

The Dew was terminated as party of a reduction-in-force does not preclude him from making out a valid claim of race discrimination; "sometimes the validity of a company's legitimate reduction masks, in an individual case, a discriminatory animus." *Gallo v. Prudential Residential Servs.*, 22 F. 3d 1219, 1221 (2d

Cir. 1994) (ADEA case). In order to survive summary judgment in such a case, however, plaintiff must show that "1) [he] belongs to the protected. . .group; 2) [he] was qualified to assume another position had it been available at the time [he] was discharged; 3) [he] was discharged; 4) and. . . the discharge occurred under circumstances suggesting that [race] was a factor." *Id.* at 1224. If the plaintiff makes out such a prima facie case, the employer then has the burden "to articulate a legitimate non-discriminatory reason for discharging the employee." *Id.* If the employer comes forward with a reason, the burden shifts to the plaintiff to prove, by a preponderance of the evidence, that the explanation was merely a pretext and that the true reason was intentional discrimination. *See id.* at 1224-25.

In attempting to establish his prima facie case, Dew relied primarily on allegations that his supervisor made racially insensitive remarks, and on statistical evidence as to the racial composition of HIP's workforce. Dew claimed that his supervisor, Dr. Falcove, was "known to make racially insensitive statements." But he

testified that he never heard Falcove make any derogatory remarks aimed at African-Americans, and could point specifically to only one offensive remark, Falcove's statement that an Indian doctor's "towel was wrapped too tight." Dew also contended that he was the only director laid off in the RIF, leaving only one African-American director in the medical department out of twenty, and that HIP's middle and upper management was predominantly white, giving rise to an inference of discrimination. It is notable, however, that while 40% of HIP's workforce was African-American at the time of Dew's termination, only 24% of the employees laid off in the RIF were African-American; and five members of the Board of Directors, as well as the Chairman and CEO, were African-American. Moreover, while Dew was the only director laid off, two employees above the director level were also laid off, and both are white.

Dew alleged that HIP could not articulate a reason for selecting his position for elimination pursuant to the RIF, and that HIP's vagueness on this point gave rise to a "suspicion" of

discrimination. But HIP did, in fact, articulate a reason for selecting Dew's position, introducing testimony that Dew's Corporate Liaison job was recently created and was not essential to the functioning of the department. Finally, Dew claimed that HIP's failure to follow its own recall policies allowed an inference of discrimination. Since it is undisputed that HIP recalled none of the employees laid off in the 1997 RIF, this argument is meritless.

The district court concluded that Dew had failed to make out a prima facie case because he had not shown that his discharge occurred under circumstances suggesting that race was a factor. But, since HIP came forward with a legitimate, nondiscriminatory reason for his termination, namely for the RIF, and since Dew failed to introduce evidence from which a reasonable jury could conclude that, in Dew's case, the RIF was merely a pretext for a racial discrimination, we need not decide whether Dew made out a prima facie case. The isolated racial remark Dew identified is not enough to survive summary judgment. And the evidence of the racial composition of HIP's workforce Dew adduced is, at best,

inconclusive and does not add to his argument. "When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, . . . a grant of summary judgment is proper." *Gallo*, 22 F. 3d at 1224. That is the case here.

Dew also contends hat he was the victim of disparate treatment based on his race in that he received less severance pay than did other terminated employees. As the district court found, however, Dew was unable to identify any similarly situated employees who received severance pay according to a different formula than he. Accordingly, he failed to make out a prima facie case of disparate treatment in this regard.

Finally, Dew alleges that the district court erred in refusing to retain supplemental jurisdiction over his state-law claims of negligent misrepresentation and violation of the New York City Human Rights Law. Whether a district court should reach pendent state-law claims, after properly dismissing a plaintiff's claims under federal law, "lies within the sound discretion of the district court."

Wanamaker v. Columbian Rope Co., 108 F. 3d 462, 467 (2d Cir. 1997). Dew has not persuaded us that the district court abused its discretion in this instance.

* * *

We have considered all of Dew's arguments and find them to be without merit. The district court's judgment is, therefore, AFFIRMED.

For the Court,

ROSEANN B. MACKECHNIE
Court Clerk

By: s/ Lucille Carr

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

JOHN DEW,

Plaintiff,

-against-

MEMORANDUM & ORDER
97-CV-7006

HEALTH INSURANCE PLAN OF GREATER NEW YORK and ANTHONY WATSON, individually and as President of HEALTH INSURANCE PLAN OF GREATER NEW YORK,

Defendants.

----------X

GLASSER, United States District Judge:

Plaintiff John Dew ("Dew"), a former at -will employee of defendant Health Insurance Plan of Greater New York ("HIP"), claims he was terminated because of his race, in violation of 42 U.S.C. § 1981. Before the court is a motion for summary judgment pursuant to Fed. R. Civ. P. 56 by defendants HIP and its president, Anthony Watson ("Watson"). For the reasons that follow, the motion is granted.

FACTS

Dew, an African-American, was employed by HIP from

late 1995 until February 1997. HIP is a not-for-profit medical corporation and insurer which contracts with independent medical groups to provide primary medical care to its insureds.

Prior to his employment at HIP, Dew worked for the Brooklyn Medical Group ("BMG"), one of the independent medical groups responsible for servicing HIP's subscribers, from approximately 1978 through July 1995. After Dew was terminated at BMG, he was hired by HIP for a newly created "Corporate Liaison" position — a management position at the "Director" level — in which he would act as the liaison between HIP and various medical groups with which it contracted. Dew was hired on an at-will basis, for an indefinite period, having no written contract of employment. See Dew Dep. at 9-11.

In early 1997, HIP determined, for financial reasons, that it would implement a management reduction in force. Every department was thus asked to evaluate which positions were not essential. Based upon that evaluation, the Medical Department selected plaintiff's "Corporate Liaison" position for elimination

because plaintiff had been employed by HIP for a relatively short time and his position was a new one. Thus, plaintiff, along with twenty-eight other members of HIP's management were terminated on February 6, 1997. Of those twenty-nine employees, seven were African-American. HIP provided plaintiff with a severance package equal to one week of pay per every six months of employment, which plaintiff concedes was determined in strict accordance with HIP's existing policy.

Plaintiff, however, attributes his termination to his race. On November 26, 1997, he commenced this action, asserting a claim under 42 U.S.C. § 1981. As evidence to support that claim, Dew points to his reassignment to a new supervisor, Dr. Michael Falcove, who plaintiff claims "routinely made racially insensitive remarks directed at all minorities." Furthermore, Dew claims he was the only African-American at the Director level or higher that was laid off and that there is a disproportionate amount of whites to African-Americans holding executive positions at HIP.

The Complaint also asserts a claim for disparate treatment,

alleging that the amount of severance pay that HIP offered Dew was considerably less than that offered to others similarly situated. In addition, Dew alleges state claims for negligent misrepresentation and a claim under New York's Human Rights Law.

The negligent misrepresentation claim is bottomed upon statements allegedly made by Fred Blickman ("Blickman"), HIP's then Vice-President of Human Resources and defendant Anthony Watson, relating to plaintiff's serverance pay from his prior job at BMG. Shortly after plaintiff left BMG, Blickman and Watson helped negotiate a "Separation Agreement" with BMG. Although plaintiff sought a settlement from BMG of three weeks pay per year of service, BMG offered only $50,000 — an amount equaling one week pay per year of service. Although he was displeased with this amount, plaintiff accepted BMG's offer and signed the Separation Agreement. However, according to plaintiff, sometime prior to signing the Agreement, Blickman and Watson told plaintiff that HIP would "take care of it." The plaintiff interpreted this to mean that HIP would pay him a sum of money in excess of what BMG

offered, to make up for the sum he desired to receive.

DISCUSSION

A. Summary Judgment Standard

A motion for summary judgment may be granted only when there is no genuine issue of material fact remaining for trial and the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56 (c). In deciding a motion for summary judgment, the Court must "view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." Allen v. Coughlin, 64 F. 3d 77, 79 (2d Cir. 1995) (citation omitted). If, viewing the evidence in that light, "a rational trier [of fact] could not find for the nonmovant, then there is no genuine issue of material fact and entry of summary judgment is appropriate." Binder v. Long Island Lighting Co., 933 F.2d 187, 191 (2d Cir. 1991).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those [materials in the record], which it believes demonstrate the absence

of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has carried its burden under Rule 56, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party is required to introduce evidence beyond the mere pleadings to show that there is an issue of material fact concerning "an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Finally, the non-moving party cannot survive a properly supported motion for summary judgment by resting on its pleadings "without 'any significant probative evidence tending to support the complaint.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 290 (1968)).

B. Plaintiff's § 1981 Claim

Section 1981 prohibits racial discrimination in the making and enforcement of private contracts. Bascomb v. Smith Barney

Inc., 1999 WL 20853, at *3 (S.D.N.Y. Jan. 15, 1999).[1] As such, to state a claim under § 1981 there must be a contractual relationship. Murray v. National Broadcasting Co., Inc., 844 F.2d 988, 995 (2d Cir. 1988).

In this case, defendants argue that because plaintiff, an at-will employee, did not have a "contract" with HIP, he cannot state a claim under §1981. Many courts have dismissed § 1981 claims on this ground. See, e.g. Bascomb v. Smith Barney Inc., 1999 WL 20853 (S.D.N.Y. 1999) (at-will employee cannot sustain racial discrimination claims against defendants under § 1981); Simpson v. Vacco, 1998 WL 118155, at *7 (S.D.N.Y. 1998) (because an

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[1] 42 U.S.C. § 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

employment contract was not entered into, plaintiff was an at-will employee and precluded from stating a § 1981 claim); Moorer v. Grumman Aerospace Corp., 964 F. Supp. 665, 675 (E.D.N.Y. 1997) ("[b]y its very terms § 1981 governs contractual relationships"), aff'd 162 F. 3d 1148 (2d Cir. 1998); Moscowitz v. Brown, 850 F. Supp. 1185, 1192 (S.D.N.Y. 1994) (plaintiff's § 1981 claim dismissed for lack of a contractual relationship with the defendant). Recently, in Curtis v. Demaio, -- F. Supp. 2d --, 1999 WL 224603 (April 15, 1999 E.D.N.Y.), in another context, this Court held differently. Analyzing New York Law, under which at-will employees have certain contract rights, the Court held that at-will employees can state a claim under § 1981 based on the conditions of their employment, namely on a hostile work environment. Id. At *4-5. However, the Court did not decide the question relevant to this case: whether an at-will employee can state a § 1981 claim where it arises from alleged discriminatory termination. This Court now answers that question in the affirmative.

Although our Circuit has not decided this issue, other Circuits have held that at-will employees have a "contract" for purposes of a § 1981 claim alleging discriminatory termination. Spriggs v. Diamond Auto Glass, 165 F.3d 1015 (4th Cir. 1999); Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc., 160 F. 3d 1048 (5th Cir. 1998). But see Gonzelez v. Ingersol Mill Mach Co., 133 F.3d 1025, 1035 (5th Cr. 1998) (noting that under Illinois law an employee at-will has no contractual rights to support a § 1981 claim). In Spriggs, the Fourth Circuit explained:

> We have seen no indication that, when when drafting the original § 1981 or the amending 1991 Act, Congress intended the term "contract" to have any meaning, other than its ordinary one. See Lane v. Ogden Entertainment, Inc., 13 F. Supp. 2d 1261, 1272 (M.D. Ala. 1998) ("'Contract' is used in § 1981 in its basic legal meaning . . . "). Having concluded that an at-will employment relationship is contractual, we hold that such relationships may therefore serve as predicate contracts for § 1981 claims.

165 F. 3d at 1018. The court in Spriggs also noted that while an at-will employee can be terminated by either party at-will, the lack of an agreed upon duration does not invalidate the underlying contract

itself. Id. at 1018 (citing Restatement (Second) of Contracts § 33 cmt. D, illus. 6 (1981)).

In Fadeyi, 160 F. 3d 1048, the Fifth Circuit reached the same conclusion:

> None can contest that discriminating against an employee on the basis of race is illegal and against public policy. In amending § 1981, Congress was advancing such public policy concerns by providing a vehicle for every employee to remedy racial discrimination in the workplace.

160 F. 3d at 1052 (internal quotation and citation omitted).

Both Spriggs and Fadeyi relied on their respective states' law to support the contractual nature of an at-will employment relationship, which New York's law does as well. See Finley v. Giacobbe, 79 F. 3d 1285, 1295 (2d Cir. 1996) (citing Gorrill v. Icelandair/Flugleidir, 761 F. 2d 847, 851-52 (2d Cir. 1985) (discussing contractual principles underlying New York's at will doctrine)); see also Mansour v. Abrams, 120 A.D. 2d 933, 502 N.Y.S. 2d 877 (4th Dep't 1986) (in certain situations, at-will employees have right to maintain action for tortious interference

with contract); Augliaro v. Brooks Bros., Inc., 802 F. Supp. 956, 963 (S.D.N.Y. 1992) (at-will employee who was terminated for illegal reason may maintain action). "For example, although an at-will employee could not file a breach of contract claim for being fired, she certainly could file a breach of contract claim if she was not paid the correct salary." Curtis, 1999 WL 224603, at *3 (citations omitted).

Although under New York law at-will employees generally do not have any contractual relationship with their employer as to the duration of employment, see Murphy v. American Prods. Corp. 58 N.Y. 2d 293, 300 (1983), the court in Lane v. Ogden Entertainment, Inc., 13 F. Supp. 2d 1261, 1272 (M.D. Ala. 1998), succinctly explained the relevance of such a relationship as it relates to a § 1981 claim:

> [the] defendant has confused the issue of whether the employee has a "contract" in the sense used in labor law — i.e., employment for an agreed duration, with certain benefits and protections — with the issue of whether there is a contract between an employer and an at-will employee at all. Even at-will employees have some sort of

> contract, in the broader legal sense of that term, with their employer. Even though the at-will employee could not file a breach of contract claim for being fired (since he has no protections), the at-will employee would be able to file a breach of contract claim if, for example, he was not paid the correct amount. "Contract" is used in § 1981 in its basic legal meaning, not a specialized labor law meaning.

This Court finds the rulings of the Fourth and Fifth Circuits to be persuasive particularly the reasoning of Fadeyi, which held:

> [E]ven though [an] at-will employee can be fired for good cause, bad cause, or no cause at all, he or she cannot be fired for an illicit cause . . . Congress could not have meant to exclude at-will workers from the reach of § 1981, as to do so would be to allow use of the ubiquitous at-will doctrine as leverage to incite violations of our state and federal laws.

160 F. 3d at 1051 (internal quotations omitted). This Court holds that an at-will employee may maintain a cause of action under § 1981 where that claim is premised upon discriminatory discharge.[2]

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[2]Plaintiff also argues that § 1981 is applicable because HIP's employment manual created a contractual relationship that limited its ability to terminate him at-will. However, because the Court finds that plaintiff may properly allege a claim under § 1981 as an at-will employee regardless of HIP's ability to terminate him at-will, the

See Lazaro v. Good Samaritan Hospital, 1999 WL 297483 (S.D.N.Y. May 6, 1999) (following Spriggs and Fadeyi holding that at-will employee may state a claim under § 1981 for wrongful termination).

Dew's § 1981 claim, although cognizable, fails nonetheless. Applicable to his § 1981 claim is the familiar three-part burden shifting analysis articulated by the Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973) that also applies to Title VII claims. See Choudhury v. Polytechnic Institute of New York, 735 F. 2d 38, 44 (2d Cir. 1984) (holding that the "same elements constitute a claim for employment discrimination under § 1981 as under Title VII"). First, plaintiff must come forward with "sufficient facts to establish a *prima facie* case that his discharge was effected under circumstances giving rise to an inference of discrimination." Greenway v. Buffalo Hilton Hotel, 143 F. 3d 47, 52 (2d Cir. 1998). Second, "if the plaintiff succeeds in [establishing] a *prima facie* case, the burden shifts to the

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Court need not address this argument.

defendant to articulate some legitimate, nondiscriminatory reason for the [adverse employment decision]." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Id.

In reduction in force cases, to establish a *prima facie* case of discrimination Dew must show that: 1) he belongs to the protected group; 2) he was qualified to assume another position had it been available at the time he was discharged; 3) he was discharged; 4) and that the discharge occurred under circumstances suggesting that race was a factor. Morris v. Northrop Gruman Corp., 37 F. Supp. 2d 556, 579 (E.D.N.Y. 1999) (citing Gallo v. Prudential Residential Services, Ltd., 22 F. 3d 1219, 1224 (2d Cir. 1994)).

In support of his *prima facie* case, Dew offers: the alleged racially-insensitive remarks of Dr. Falcove; statistical evidence

highlighting the number of African-Americans at HIP; his job performance; HIP's alleged violations of its own policies involving recall of employees after termination; and the "vague" criteria utilized by HIP to determine which positions would be eliminated. Defendants' argue that such evidence is insufficient to satisfy the fourth element of a *prima facie* case — that Dew's discharge occurred under circumstances suggesting that race was a factor. The Court agrees.

Although "the burden of establishing a *prima facie* case is not onerous, and has been frequently described as minimal," this Court finds that the evidence presented by Dew in support of his claim does not, in any way, suggest that his race was a factor in his termination.

For example, although Dew claims that his newly appointed supervisor, Dr. Falcove, was "known to routinely make racially insensitive remarks," he could not identify one single remark made by Falcove relating to his race and could recall only one instance in which Falcove made a perceived racial remark to the effect that an

Indian doctor's "towel was wrapped too tight." See Dew Dep. at 102-103, Ex C. to Def.'s Mem. Even assuming that Falcove's remark had a discriminatory overtone and was so interpreted by the Indian doctor, it would not give rise to viable claim of discrimination. See, e.g., Schwapp v. Town of Avon, 118 F. 3d 196, 110 (2d Cir. 1997) ("utterance of an. . . epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII"); Snell v. Suffolk County, 782 F.2d 1094, 1102 (2d Cir. 1984) (plaintiff must prove more than few isolated incidents of racial enmity to establish a Title VII violation).

Dew also points to an alleged statistical racial imbalance at HIP in support of his *prima facie* case. He claims that he was the only director laid off, leaving only one other black directory in the medical department out of twenty. Dew also claims that middle to upper management at HIP is predominantly white. However, what Dew fails to note is that, at the time of Dew's termination, African-Americans accounted for 40% of HIP's employees, and non-whites,

including African-Americans, accounted for approximately 58% of HIP's employees. Smith Aff. ¶ 3. Moreover, it is interesting to note that defendant Watson, the Chairman and C.E.O. of HIP, is African-American as are five other members of the Board of Directors. Id. In addition, in 1995, during another reduction in force by HIP, three directors were terminated, all of whom were white. Also, of the twenty-nine employees terminated by HIP in 1997, only seven were black, Id. In any event, while statistical evidence may sometimes enable a plaintiff to carry his modest burden of creating a *prima facie* case, see Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977), in this case, Dew's selective statistical evidence alone would not justify even an inference that his termination was racially motivated. See generally Raskin v. Wyatt Co., 125 F. 3d 55, 65-68 (2d Cir. 1997) (district court properly determined that proffered statistical evidence was not probative of discrimination); Martin v. Citibank, N.A., 762 F. 2d 212, 218 (2d Cir. 1985) ("the statistical proof is not sufficient to carry the case to the jury in itself"), Hudson v. Int'l Business

Machines Corp., 620 F. 2d 351, 355 (2d Cir. 1980) (where plaintiff "has failed to establish this case . . . the statistics standing alone do not create it").

In fine, what Dew would have HIP do would be to establish a quota system devised to achieve a statistical relationship between the universe of HIP employees and its directorate. To paraphrase the recent decision in Hill v. Ross, 1999 WL 418047, at *4 (7th Cir. June 23, 1999): "What [Dew] appears to have in mind is a world in which the absence of discrimination means that [the Board of Directors] would exactly mirror the population from which its members are [chosen]. But that is statistical nonsense." Id.

Plaintiff's other evidence is equally unpersuasive. He claims that HIP's "vague" criteria for selecting which positions were to be eliminated "give[s] rise to suspicions that positions were arbitrarily selected according to the whims and prejudices of department heads and their close associates." Pl.'s Mem. of Law at 23. Mere speculation such as this does not create a fair inference of discrimination. See, e.g., Lediju v. New York City Dept. of

Transportation, 173 F.R.D. 105, 114 (S.D.N.Y. 1997) ("plaintiff's speculation and generalities . . .[are] insufficient even to state a *prima facie* case under McDonnell Douglas . . . ."); Burrell v. Bentsen, 1993 WL 535076 at *10 (S.D.N.Y. Dec. 21 1993) ("plaintiff cannot satisfy his burden of proof by offers of speculative beliefs and gut feelings"). Nor does his claim that his "importance to the operation of HIP" somehow shows a hidden racial motive." Id. At 22.

In sum, the "evidence" presented by Dew precludes any rational inference that discrimination played any part in HIP's decision to terminate him. He cannot, therefore, establish a *prima facie* case of discrimination under § 1981. However, even if it is assumed that one were established, his claim would fail nonetheless because the record requires the conclusion that HIP had a legitimate, non-discriminatory reason for terminating him and his proffered "evidence" is insufficient to show that the reason for his termination was pretextual.

The Second Circuit has held that a defendant's burden to

articulate a non-discriminatory reason for a plaintiff's discharge is also a light one. "The employer need not persuade the court that it was motivated by the reason that it provides; rather, it must simply articulate and explanation that, if true, would connote lawful behavior." Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 52 (2d Cir. 1998). Defendants have indeed produced ample evidence to satisfy this "light" burden — namely, evidence that HIP terminated Dew pursuant to a company wide reduction in force that was initiated for financial reasons. That program, supported by HIP's claim that it decided to eliminate plaintiff's position due to the relatively short time he occupied it and the fact that it was a newly created position, is sufficient to rebut the presumption of discrimination created by *prima facie* case. See Greenway, 143 F. 3d at 52; see also Scaria v. Rubir, 117 F. 3d 652, 654 (2d Cir. 1997) (quoting Fisher v. Vassar College, 114 F. 3d 1332, 1347 (2d Cir. 1997)).

Having satisfied its burden, the burden hot shifts to Dew who must "persuade the fact-finder that [HIP's} proffered

explanation is merely a pretext for its intentional discrimination." Greenway, 143 F. 3d at 52. That requires Dew to show that HIP's reason for firing him "was false, and that more likely than not [his] . . . [race] was the real reason for the discharge." Holt v. KMI-Continental, Inc., 95 F. 3d 123, 129 (2d Cir. 1996). As the Second Circuit has observed:

> When a district court . . . considers on a motion for summary judgment whether the evidence can support a verdict of discrimination, no special rules affect the weight to be given to the prima facie case, the truthfulness of falsity of the employer's explanation, or any other piece of evidence. As in any other type of case, the judge must analyze the evidence, along with the inferences that may be reasonably drawn from it, and decide if it raises a jury question as to whether the plaintiff was the victim of discrimination.

Scaria v. Rubin, 117 F. 3d 652, 654 (2d Cir. 1997) (quoting Fisher, 114 F. 3d at 1332)).

In this case, plaintiff falls short of meeting that burden. He advances the same evidence articulated above, which principally consists of inconclusive statistics of an alleged racial imbalance at

HIP and one stray questionably racial remark not even directed at him or someone of his race. From this, Dew concludes that the only possible reason for HIP's elimination of his position in its reduction in force program was his race. That conclusion is flawed. It cannot "support a rational finding that the legitimate, non-discriminatory reasons proffered by [HIP] were false, and that more likely than not" plaintiff's race was the real reason for his termination. Holt, 95 F. 3d at 132. Accordingly, defendant's motion for summary judgment as to plaintiff's § 1981 claim is granted.

C. Plaintiff's Disparate Treatment Claim

Plaintiff also alleges a claim for disparate treatment under § 1981. The claim is also analyzed under the McDonnell-Douglas Court's three-part burden shifting analysis. See Martin v. Citibank, N.A., 762 F. 2d 212, 216 (2d Cir. 1985); see also Rosen Reckitt & Colman, Inc., 1992 WL 367082, at *3 (S.D.N.Y. No. 25, 1992). As explained above, as part of his *prima facie* case, Dew is required to show that his race was a factor in the alleged disparate treatment.

Specifically, Dew's disparate impact claim is bottomed upon his allegation that the amount of severance pay that HIP offered him was considerably less than that offered others similarly situated. However, in support of this claim, Dew identifies not a single individual at the Director level terminated under HIP's reduction in force program, who received more severance pay than he did. Instead, Dew's theory of disparate treatment rests on the alleged "vagueness" of the severance pay formula in HIP's written policy. He claims it allows HIP to deviate from that formula in situations of "discharge for reasonable cause or release [ ], other than a separation." Pl.'s Mem. of Law at 32. Dew "suggests . . . that management selectively defines firing as either a 'lay off' or 'discharge for reasonable cause or release' . . . to suit its particular desires in each case." Id.

Although Dew points to several former HIP employees to support his theory,[3] he fails to submit any credible evidence that

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[3]Dew claims that Pat Coyle, John Grywalski and Victoria Rondina, former Director, Senior Vice-President and Vice-President, respectively, were paid more than he was. Although HIP does not contest this, it claims that those employees were not laid off under a

race played a part in the implementation of that formula. Nor does Dew offer a shred of evidence that HIP deviated from its formula during the 1997 reduction in force. Indeed, Dew's severance pay was calculated according to the standard formula contained in HIP's Personnel Policy Manual as was the severance pay of all of the Directors laid off in the 1995 reduction in force (all of whom were white).

Simply put, Dew's conclusory allegations that the "ambiguities . . . [in HIP's] lay-off allowance formula are determined in a discriminatory way," see Pl.'s Mem. of Law at 34, are insufficient to overcome a motion for summary judgment. As such, because Dew cannot show that his race was a factor in HIP's severance pay policy, he is unable to make out a *prima facie* of disparate treatment. Defendants' motion is, therefore granted.

D. Plaintiff's Remaining State Law Claims

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reduction in force plan but were terminated for other reasons, and as a result, the amount of their severance pay is discretionary. See Def.'s Mem. of Law at 16-17. In any event, as HIP correctly argues, the amount of their pay alone does not suggest any racial animus against Plaintiff.

Plaintiff also asserts pendent state law claims for negligent misrepresentation and violations of the N.Y. Human Rights Law. Since plaintiff has failed to establish a claim for discrimination under § 1981, this Court declines to exercise jurisdiction over those claims. 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . .if. . . the district court has dismissed all claims over which it has original jurisdiction. . . ."); see also Wanamaker v. Columbian Rope Co., 108 F. 3d 462, 466-67 (2d Cir. 1997) (a district court may dismiss claims brought under New York Human Rights Law on ground that plaintiff failed to establish claim under federal law). "Whether the court should reach pendent state claims lies within the sound discretion of the district court." Id. (citing Morse v. University of Vermont, 973 F. 2d 122, 127 (2d Cir. 1992)). Accordingly, plaintiff's negligent misrepresentation and Human Rights law claims are dismissed.

CONCLUSION

For the foregoing reasons, defendants' motion for summary is granted.

SO ORDERED.

s/ I. Leo Glasser
United States District Judge

Dated: Brooklyn, New York
July 15, 1999

Copies of the foregoing Memorandum and Order were this day sent to:

Roger V. Archibald, Esq.
16 Court Street
Brooklyn, New York 11241

Howard Lavin, Esq.
Stroock & Stroock & Lavan
180 Maiden Lane
New York, New York 10038

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOHN DEW,

Plaintiff,

-against-

JUDGMENT
97-CV-7006 (ILG)

HEALTH INSURANCE PLAN OF GREATER NEW YORK and ANTHONY WATSON, individually and as President of HEALTH INSURANCE PLAN OF GREATER NEW YORK,

Defendants.

----------X

A Memorandum and Order of the Honorable I. Leo Glasser, United States District Judge, having been filed on July 20, 1999, granting the defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56; it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants and, that the defendants' motion for summary judgment is granted.

Dated: Brooklyn, New York
July 22, 1999

ROBERT C. HEINEMANN
Clerk of Court

(2)

No. 99-2001

Supreme Court, U.S.
FILED
JUL 12 2000
CLERK

IN THE

Supreme Court of the United States

JOHN DEW,

Petitioner,

—v.—

HEALTH INSURANCE PLAN OF GREATER NEW YORK and ANTHONY WATSON, Individually and as President of HIP,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Charles G. Moerdler
Counsel of Record
Alan M. Klinger
Howard S. Lavin
Michele L. Pahmer
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038
(212) 806-5400

Attorneys for Respondents

20pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should the Petition be granted in this garden-variety discrimination case to review a summary order by the Court of Appeals for the Second Circuit which applied the traditional burden-shifting analysis in affirming the District Court's grant of summary judgment?

2. Should the Petition be granted to consider whether 42 U.S.C. 1981 applies to at-will employees, notwithstanding the fact that the Second Circuit expressly declined to decide the issue in this case and has subsequently joined the Fourth, Fifth, and Tenth Circuits in finding that it does?

3. Should the Petition be granted to consider whether the Second Circuit misapplied well-settled principles of law to the particular facts presented here, or whether it made erroneous factual findings?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents certify that: (i) HIP Foundation, Inc., is the parent corporation of Health Insurance Plan of Greater New York; and (ii) there are no publicly-held companies that own the stock of Health Insurance Plan of Greater New York.

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IN THE

Supreme Court of the United States

No. 99-2001

JOHN DEW,

Petitioner,

—v.—

HEALTH INSURANCE PLAN OF GREATER NEW YORK and ANTHONY WATSON, Individually and as President of HIP,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Health Insurance Plan of Greater New York ("HIP") and Anthony Watson respectfully request that this Court deny the Petition for a Writ of Certiorari to review the unpublished opinion of the United States Court of Appeals for the Second Circuit, reported at 208 F.3d 202 (2d Cir. 2000) (table); 2000 WL 282488 (2d Cir. 2000).

There is no reason for this Court to grant the Petition in this garden-variety discrimination case. No novel legal issues are presented here, nor does the Court of Appeals' decision create a conflict among the Circuits.

The Second Circuit's unpublished opinion did nothing more than apply familiar legal principles to the particular facts of this case. Moreover, because there is no precedential impact to the unreported decision below, it can have no effect on the outcome of other cases.

COUNTER-STATEMENT OF THE CASE

A. Statement of Undisputed Facts

HIP is a not-for-profit licensed health maintenance organization and insurer which contracts with several independent medical groups to provide primary medical care for its insureds. JA 126.[1]

Petitioner, John Dew ("Dew") is an African-American male hired by HIP in late 1995 to be the Corporate Liason in HIP's Medical Department. Pet. at 3, A3. "Corporate Liason" was a new position at HIP, created for Dew following his termination from Brooklyn Medical Group, one of the independent medical groups with which HIP contracted. JA 84, 106.

In 1997, HIP decided to cut costs by implementing a management reduction in force ("RIF"). Accordingly, each department was asked to identify non-essential positions that could be eliminated. The Medical Department chose Dew's newly-created Corporate Liason position for the RIF. JA 53-54, 85-89.

On February 6, 1997, Dew and 28 other management employees whose positions were eliminated were laid off. JA 117. Seven of the 29 employees terminated as part of this RIF (24%) were African American, as compared to the 40% composition of African-Americans in

[1] The Joint Appendix filed in the Court of Appeals is referenced herein as "JA" [page number]. Citations to the Petition appear herein as "Pet." at [page number].

HIP's overall workforce. Moreover, Dew was the only African-American among the three terminated employees at Dew's Director level or higher. Five remaining Directors, as well as respondent Anthony Watson, the Chairman of the Board Chief Executive Officer of HIP, are African-American. JA 117-18, 127.

Upon his termination, Dew was provided with severance in accordance with the formula set forth in HIP's Personnel Policy Manual. JA 119-20.

Following his termination, Dew initiated the underlying race discrimination action against HIP and Watson. Specifically, Dew alleged that he was discriminated against in violation of 42 USC § 1981 in his selection for the RIF as well as in the amount of his severance payment, in addition to various state law claims.

B. The District Court Opinion

The District Court (Glasser, J.) issued an unpublished Memorandum and Order dated July 15, 1999, by which it granted summary judgment dismissing Dew's complaint in its entirety. (The District Court's opinion is annexed to the Petition at A13-A38). After setting forth the well-settled summary judgment standard, the District Court applied the familiar tripartite burden-shifting analysis articulated by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Pet. at A25. Upon careful consideration of the evidence proffered by Dew to support his discriminatory discharge claim, the District Court determined that Dew failed to meet even the minimal burden of establishing a *prima facie* case of discrimination. Additionally, the District Court concluded that, even assuming a *prima facie* case had been shown, Dew failed to rebut the non-discriminatory reason proffered by HIP; namely, the management RIF. Pet. at A31.

Similarly, the District Court concluded that Dew failed to produce any evidence suggesting that his race played any role in applying the formula set forth in HIP's employment manual in calculating Dew's severance upon his termination. Pet. at A36.

Finally, having dismissed Dew's federal claims, the District Court declined to exercise its discretionary jurisdiction over Dew's state law claims. Pet. at A37.

C. The Second Circuit Opinion

Upon Dew's appeal and following a *de novo* review of the District Court's grant of summary judgment, the Second Circuit unanimously concluded that Dew failed to demonstrate any factual issues to be tried and, accordingly, affirmed the decision of the District Court in an unpublished summary order. (The Second Circuit's summary order is annexed to the Petition at A1-A12). Noting that HIP had articulated a non-discriminatory reason for Dew's discharge and that Dew failed to put forth evidence of pretext, the Second Circuit concluded that it did not need to decide whether Dew's evidence also failed to make out a *prima facie* case. Specifically, the Second Circuit determined that the isolated stray remark and the selective statistical evidence relied on by Dew were insufficient to permit a rational jury to find in his favor on his discriminatory discharge claim. Pet. at A10-A11.

The Circuit Court also concluded that Dew failed to identify any other non-minority employees terminated as part of a RIF who received severance according to a different formula from the one applied to Dew. Accordingly, the Court concluded that Dew failed to sustain his burden of establishing a *prima facie* case of disparate treatment with respect to his severance. Pet. at A11.

Finally, finding no abuse of discretion in the District Court's refusal to exercise jurisdiction over Dew's state law claims, the Second Circuit affirmed the District Court's grant of summary judgment in its entirety. Pet. at A11-A12.

REASONS FOR DENYING THE WRIT

This case lacks any compelling reason warranting this Court's review. *See* Sup. Ct. R. 10. The Second Circuit's unpublished unanimous opinion follows the settled law of this Court and presents no inconsistency with other Circuits and no novel legal issues requiring this Court's consideration.

I.

THE WRIT SHOULD BE DENIED BECAUSE THE OPINION BELOW DOES NO MORE THAN APPLY THE WELL-SETTLED BURDEN-SHIFTING ANALYSIS APPLICABLE IN DISCRIMINATION CASES

A. The Second Circuit's Opinion Is Based Soundly On The *McDonnell-Douglas* Burden Shifting Analysis

Contrary to Petitioner's claim that the Second Circuit has "articulated a new standard for considering a plaintiff's claim of race discrimination" (Pet. at 8), the Second Circuit's decision is based on a careful analysis of the facts under the familiar *McDonnell-Douglas* standard.

Dew's attempt to cast the Second Circuit's opinion as a departure from settled jurisprudential principles is either disingenuous or based on a misreading of that opinion. Dew erroneously contends that the Second Cir-

cuit "ignor[ed] the multi-stage test articulated in *McDonnell-Douglas* and simply assessed whether Dew's evidence, on the whole, was sufficient to survive summary judgment." Pet. at 8.[2] To the contrary, the Court expressly laid out the applicable three-part burden-shifting test and assessed the evidence in the record against that standard. *Id.* at A8-A10. Fully cognizant of the tripartite standard, the Court reasoned that:

> since HIP came forward with a legitimate, nondiscriminatory reason for his termination, namely, [ ] the RIF, and since Dew failed to introduce evidence from which a reasonable jury could conclude that, in Dew's case, the RIF was merely a pretext for racial discrimination, we need not decide whether Dew made out a prima facie case.

Id. at A10. The fact that the Second Circuit did not determine whether the insufficiency of Dew's evidence also constituted a failure at the *prima facie* stage does not amount to "re-wr[iting] this Court's jurisprudence." *Id.* at 11. If it did, numerous other courts spanning the Circuits have also "re-written" the relevant standard in assessing whether summary judgment was appropriate in discrimination cases.[3] Indeed, this Court

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[2] Even if the Second Circuit had simply assessed whether Dew's evidence on the whole was sufficient to survive summary judgment(which it did not), Dew would nevertheless not be entitled to relief in light of the Court's determination that his proffered evidence was wholly insufficient to sustain his claims.

[3] *See, e.g., Brennan v. Metropolitan Opera Assoc., Inc.*, 192 F.3d 310, 317 (2d Cir. 1999) ("we need not decide the issue, however, because even if appellant succeeded at the prima facie stage summary judgment was still properly granted"); *Ransom v. CSC Consulting, Inc.*, __ F.3d __, 2000 WL 772873, at * 3 (7th Cir. 2000) ("[w]e will bypass the prima facie case . . . because, as discussed below, CSC has presented evidence of a legitimate non-discriminatory reason for Ransom's termination, and there is no evidence of pretext"); *Connor v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997)

has expressly rejected the type of mechanical application of *McDonnell-Douglas* urged by Petitioner here. *See United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("[t]he prima facie case method established in McDonnell-Douglas was 'never intended to be rigid, mechanized or ritualistic' ") (citation omitted).

Thus, far from "collapsing" or "confounding" the traditional burden-shifting analysis (Pet. at 7, 10), the Second Circuit applied that analysis to the facts presented in this case without exception or limitation. At most then, the Petition takes issue with the *result* reached by the Second Circuit upon its application of those familiar legal principles. *See, e.g.*, Pet. at 7 ("summary judgment should not have been granted and this Court should intervene to correct the Court of Appeals' erroneous *application* of summary judgment procedures . . .") (emphasis added). However, even if the Second Circuit had misapplied the *McDonnell-Douglas* analysis to the facts of this case, that still would not warrant this Court's extraordinary review. *See* Sup. Ct. R. 10 ("[a] petition for a Writ is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

B. The Other Claimed Evidentiary Errors Are Without Merit And Are Not Grounds For Granting The Writ

The other claimed errors identified by Petitioner in support of the Writ are equally without merit. Essentially, Petitioner contends that the Court of Appeals overlooked certain evidentiary issues which, accord-

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("[w]hether there are sufficient other circumstances to sustain Connor's burden of proving . . . his prima facie case we need not decide because the district court opinion can be affirmed on the basis of its holding at the next stage of the McDonnell-Douglas analysis . . .").

ing to Petitioner, would have precluded summary judgment.

Initially, Petitioner relies on an isolated racial remark about Indians made by Dew's supervisor. *See* Pet. 14-15.[4] Contrary to Petitioner's suggestion, however, the Second Circuit correctly applied settled legal principles in its determination that this remark—not concerning African-Americans and not made in the context of Dew's discharge—was insufficient to defeat summary judgment. *See, e.g., Spence v. Maryland Cas. Co.*, 803 F.Supp. 649 (W.D.N.Y. 1992), *aff'd.* 995 F.2d 1147 (2d Cir. 1993) ("stray remarks are 'insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision-maker in issue' ") (citations omitted).[5]

Petitioner's second claimed evidentiary oversight fares no better. Petitioner suggests that the Second Circuit failed to consider evidence that other former HIP employees received greater severance upon their termi-

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[4] The Petition seems to contend that this stray remark only establishes Dew's *prima facie* case. *See* Pet. at 15. Even if this were true, it would not fulfill his ultimate *McDonnell-Douglas* burden of rebutting HIP's non-discriminatory reason for his termination.

[5] Petitioner suggests that summary judgment is inappropriate in the vast majority of discrimination cases, because intent is at issue. *See* Pet. at 15-16. However, the opinion below is entirely consistent with the Second Circuit's affirmance of summary judgment notwithstanding the fact that intent may be in issue, where insufficient evidence of discriminatory intent is produced. *See, e.g., Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985) (the "salutary purposes of summary judgment . . . apply no less to discrimination cases than to commercial or other areas of litigation"); *McLee v. Chrysler Corp.*, 38 F.3d 67, 68 (2d Cir. 1994) (summary judgment is not inappropriate in discrimination cases merely because they involve issues of intent and motive); *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 193 (2d Cir. 1999) (summary judgment affirmed as no rational fact-finder could find discriminatory firing).

nation than Dew received upon his. *See* Pet. at 5. Contrary to Petitioner's claim, the Second Circuit did consider the evidence submitted by Dew; however, because the other individuals identified by Dew had not been terminated as part of the RIF, the Court concluded that they were not similarly situated to Dew for purposes of making comparisons. *See* Pet. at A11 ("[a]s the District Court found, however, Dew was unable to identify any similarly-situated employees who received severance pay in accordance with a different formula than he"). In so holding, the Second Circuit applied its well-settled standards for determining whether employees are similarly situated. *See, e.g., Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 64 (2d Cir. 1997) (for comparisons to be probative of discrimination, employees must be similarly situated in all material respects). Because Dew failed to present any other evidence to support this claim, the Second Circuit correctly concluded based on the foregoing standard that Dew had failed to make out a *prima facie* case of disparate treatment.

Finally, Dew erroneously claims that the Court of Appeals failed to consider the selective statistical information he cited. *See* Pet. at 18 ("the Court of Appeals refused to consider other statistical evidence showing discriminatory intent . . . and thereby ignored the persuasive effect of Dew's statistical evidence"). Just as it analyzed Dew's evidence in support of his disparate treatment claim, the Second Circuit considered the statistical evidence Dew submitted. *See* Pet. at A9 ("Dew also contended that he was the only director laid off in the RIF, leaving only one African-American director in the medical department out of twenty, and that HIP's middle and upper management was predominantly white, giving rise to an inference of discrimination"). In affirming the grant of summary judgment, the Circuit Court

properly determined that this evidence, when viewed in light of all the evidence submitted,[6] did not create an inference of discrimination sufficient to survive summary judgment. *See, e.g.*, *Smith v. Xerox Corp.*, 196 F.3d 358, 365 (2d Cir. 1999) (to make out a prima facie case of discrimination, statistical data must be "sufficiently substantial" to show that terminated employees' membership in a protected group caused the exclusion of their jobs) (*citing Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988).[7]

Moreover, as noted above, none of these claimed errors present "compelling" circumstances warranting this Court's review. At most, these claimed errors constitute "erroneous factual findings or the misapplication of a properly stated rule of law"; no important jurisprudential purpose is served by grating the Writ to review these evidentiary issues. Sup. Ct. R. 10.

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[6] In particular, the Court noted that 40% of HIP's workforce were African-American; that Dew was the only African-American employee terminated from a position of Director or higher; and that there were still five African-American Directors, in addition to Respondent Watson, the Chairman and CEO. *See* Pet. at A4.

[7] Also relying on *Watson*, the Second Circuit in *Smith* recognized that the probative value of statistical evidence must be determined on a case-by-case basis. *See* 196 F.3d at 366 (statistics' "usefulness depends on all of the surrounding facts and circumstances") (citations omitted). As the Second Circuit correctly held below, Dew's selective statistical data is not probative of discrimination in light of all the facts of circumstances presented here.

II.

THE WRIT SHOULD BE DENIED BECAUSE THE OPINION BELOW DOES NOT PRESENT ANY NOVEL LEGAL ISSUES OR ANY OTHER IMPORTANT REASONS FOR THIS COURT'S REVIEW

Dew's Petition does not raise any significant legal issues for determination by this Court. As explained, *supra*, and contrary to Petitioner's suggestion otherwise, the Second Circuit's opinion did not set a new standard governing discrimination claims brought under Section 1981. That decision merely reiterated and applied well-settled rules pertaining to the parties' respective burdens on a motion for summary judgment in a Section 1981 race discrimination case. Nothing in that decision presents an issue of concern for this Court.

A. The Second Circuit Decision Is A Summary Order Which May Not Be Relied Upon As Authority

The Second Circuit, by designating its unanimous affirmance as a "summary order," demonstrated its belief that "no jurisprudential purpose would be served by a written opinion . . ." Rules of the United States Court of Appeals for the Second Circuit, § 0.23. Thus, the decision may not be cited or otherwise relied upon by any person in any court.

Because the Second Circuit's decision has no "jurisprudential purpose" and may not be cited as authority, there can be no adverse consequences from that decision and it cannot be relied on to even suggest the Second Circuit's departure from the well-settled *McDonnell-Douglas* analysis. No purpose is therefore served by this Court's review of that decision.

B. The Decision Below Does Not Present Any Other Significant Issue Requiring This Court's Review

In addition to challenging the Second Circuit's analysis of the evidence Dew introduced in an attempt to survive summary judgment, Petitioner contends that *certiorari* is warranted in this case for this Court to determine whether an at-will employee may assert a claim under Section 1981. *See* Pet. at 9-10. Dew's reliance on this issue as a means of obtaining further review is surprising given that the District decided the issue in Dew's favor and the Circuit Court assumed, without deciding, that Dew had standing under Section 1981. *See* Pet. at A24 [District Court Opinion] ("[t]his Court holds that an at-will employee may maintain a cause of action under § 1981 where that claim is premised upon discriminatory discharge"); *id.* at A7 [Second Circuit Opinion] ("[w]e need not decide this issue, however, because assuming *arguendo* that Dew is protected by § 1981, he has failed to allege facts sufficient to withstand a motion for summary judgment").[8] Thus, review of this issue is not warranted in this case in which the Second Circuit explicitly declined to resolve this question, finding Dew's appeal meritless on other grounds.

Indeed, earlier this year, this Court denied *certiorari* in *Perry v. Woodward*, 199 F.3d 1126 (10th Cir. 1999), *cert. denied*, __ U.S. __, 120 S.Ct. 1964 (May 15, 2000), in which the Tenth Circuit concluded that an at-will employee may sue for discriminatory discharge under § 1981. Surely the facts of this case, in which the Second Circuit did not even reach this issue, do not present a more compelling reason for this Court's review.

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[8] Just last month, the Second Circuit resolved this question as anticipated by the District Court in this case, squarely holding that an at-will employee may sue under § 1981. *Lauture v. International Business Machines Corp.*, __ F.3d __, 2000 WL 791769 (2d Cir. June 20, 2000).

CONCLUSION

Two courts have independently reviewed and rejected plaintiff's claim of discrimination under the familiar *McDonnell-Douglas* burden-shifting analysis. The Petition simply does not demonstrate any compelling reason for this Court to grant the extraordinary remedy of *certiorari*. Accordingly, Respondents respectfully submit that the Writ should be denied.

Respectfully submitted,

Charles G. Moerdler
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038
(212) 806-5400

Attorneys for Respondents

Of Counsel:

Alan M. Klinger
Howard S. Lavin
Michele L. Pahmer

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(3)

No. 99-2001

In the

Supreme Court of the United States

OCTOBER TERM, 1999

JOHN DEW,

Petitioner,

v.

HEALTH INSURANCE PLAN OF GREATER NEW YORK and ANTHONY WATSON, Individually and as President of HIP,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Roger V. Archibald
Counsel of Record
16 Court Street, Suite 2400
Brooklyn, New York 11241
(718) 237-1111

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Should the Petition be Granted Because, After This Court's Decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, No. 99-536 (June 12, 2000), This Case Raises Important Questions Regarding the Necessity of Presenting Direct Evidence of Discrimination After Establishing a Prima Facie Case?

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PRELIMINARY STATEMENT

This Reply Brief is necessary to refute Respondents' assertion that this case does not present any issues meriting review by this Court. Contrary to Respondents' assertions, this case is not a "garden-variety discrimination case." (Opposition at i.) This Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (June 12, 2000), issued after the Petition was prepared and sent in for filing but before Respondents' filed their opposition, reaffirms the importance of the issues presented in this case.

In affirming the District Court's entry of summary judgment, the Second Circuit, after confounding the three prongs of the *McDonnell-Douglas* analysis, ultimately concluded that, whether or not Dew made out a prima facie case of discrimination, Dew did not present sufficient evidence of actual discrimination to avoid summary judgment.

The Second Circuit's determination that "the isolated racial remark Dew identified is not enough to survive summary judgment" is called into question by this Court's recent decision in *Reeves*. This Court made it clear in *Reeves* that an employee need not present evidence of intentional discrimination to challenge an employer's purported nondiscriminatory reason for termination and avoid having the case taken away from a jury. In addition to the reasons presented in the Petition itself, the Petition should be granted because, after *Reeves*, this case presents important issues regarding what evidence a party needs to present, such as the statistical evidence proffered by Dew, to avoid entry of summary judgment after establishing a prima facie case of discrimination.

POINT I – The Petition Should be Granted Because, After This Court's Decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, No. 99-536 (June 12, 2000), This Case Raises Important Questions Regarding the Necessity of Presenting Direct Evidence of Discrimination After Establishing a Prima Facie Case.

The Petition should be granted because, contrary to Respondents' assertion, this case presents significant issues relating to the evidentiary burden placed on plaintiffs in employment discrimination cases. The Second Circuit's decision is premised on Dew's alleged failure to prove by sufficient evidence of actual discrimination. This Court's decision in *Reeves* calls into question the Second Circuit's determination that, even if Dew established a prima facie case of discrimination, his alleged failure to present sufficient direct evidence of discrimination mandated entry of summary judgment. In *Reeves*, this Court established that indirect evidence of discrimination is sufficient to support a jury verdict finding discrimination. The Petition should be granted to establish that summary judgment should not be granted where a party presents some evidence that could be the basis for a jury verdict finding discrimination.

A. The Second Circuit Concluded That, Even if Dew Presented a Prima Facie Case of Discrimination, Dew Did Not Proffer Sufficient Evidence of Direct Discrimination to Survive Summary Judgment.

The Second Circuit's decision below raises issues similar to those confronted by this Court in *Reeves*. turned on precisely

the issue addressed by the Supreme Court in *Reeves*. In its decision, the Second Circuit discussed the issue of whether Dew established a prima facie case, which had been the focus of the District Court's entry of summary judgment. In doing so, as discussed in the Petition, the Second Circuit collapsed and confounded the *McDonnell-Douglas* analysis. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). In reaching its ultimate decision, however, the Second Circuit presumed that Dew did establish a prima facie case. Specifically, the Second Circuit stated that "we need not decide whether Dew made out a prima facie case." (A 10.) Instead, the Second Circuit focused exclusively on whether or not Dew had introduced direct evidence of discrimination and, in particular, evidence sufficient to establish that the RIF was a mere pretext for a racially-motivated termination. *Id.* The Second Circuit specifically stated that the "isolated racial remark Dew identified" as evidence of intentional discrimination "is not enough to survive summary judgment" *Id.* The court then concluded that, without evidence of intentional discrimination, the statistical evidence of the racial composition of HIP's workforce was "at best, inconclusive." *Id.* Concluding that this evidence was insufficient to be the basis for a jury verdict in his favor, the Second Circuit affirmed entry of summary judgment. *Id.* This analysis is called into question by this Court's recent decision in *Reeves*.

In *Reeves*, this Court rejected the "pretext-plus" analysis used by the Second Circuit in this case. *Reeves* involved a claim that the employee had been the victim of age discrimination when he was discharged by his employer. The Court of Appeals in *Reeves* determined that, even if the plaintiff established a prima facie case and proffered evidence that the purported nondiscriminatory basis for termination was pretextual, the employee failed to present sufficient evidence that the employment decision was motivated by age. *Reeves*, 120 S.Ct.

at 2107-08. This Court reversed, holding that the Court of Appeals "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Id.* at 2108. Instead, a prima facie case, coupled with "sufficient evidence to find that the employer's asserted justification is false" is enough for the jury to find in the plaintiff's favor. *Id.* at 2109. No direct evidence of intentional discrimination is necessary, which also contradicts previous decisions of the Second Circuit, including *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997). The decision in *Reeves* demonstrates this Court's intent to preserve the role of juries in determining facts related to discrimination cases.

B. This Cases Presents Significant Issues Regarding What Evidentiary Showing is Necessary, After Establishing a Prima Facie Case, to Avoid Summary Judgment.

Having decided in *Reeves* that a jury may find discrimination where a party establishes a *McDonnell-Douglas* prima facie case of discrimination, this case now presents the issue of what evidentiary showing is needed beyond the prima facie case to survive summary judgment. The Court of Appeals took this case away from the jury because it determined that, having established a prima facie case, Dew's statistical evidence and evidence of racially-insensitive remarks by his supervisor was not enough to survive summary judgment. The Petition should be granted to determine whether statistical evidence and indirect evidence of discrimination, such as that proffered by Dew, is sufficient to avoid summary judgment.

This Court has previously indicated that statistical evidence can be a basis for a finding of discrimination. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) ("statistics can be an important source of proof in employment

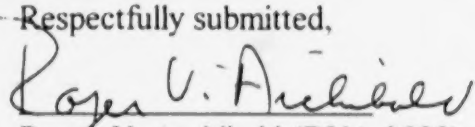
discrimination cases"). This case therefore presents the important issue of whether statistical evidence must be accompanied by direct evidence of discrimination for a jury to determine that an employer acted with discriminatory intent.

In *Reeves*, this Court reaffirmed the jury's central role in making a determination regarding whether a party suffered discrimination in employment. The Second Circuit's decision in this case is incompatible with *Reeves*. The Petition should be granted to consider what evidentiary showing is needed, post-*Reeves*, to avoid entry of summary judgment and allow the case to proceed to a jury.

CONCLUSION

The questions presented in this Petition are important questions of law involving this Court's supervisory power over the lower courts and the federal rules. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Roger V. Archibald (RVA 0588)

Roger V. Archibald, P.C.
16 Court Street, Suite 2400
Brooklyn, New York 11241
(718) 237-1111

Attorney for Petitioner